

# The POWELL Law Firm

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April 25, 2013

Ms. LaDonna Castanuela  
Chief Clerk  
Texas Commission on Environmental Quality  
P. O. Box 13087  
MC 105  
Austin, Texas 78711-3087

Re: SOAH Docket No. 582-12-5907; TCEQ Docket No. 2011-1756-MLM-E; In the  
Matter of an Enforcement Against League City Paving Company, Inc.;  
RN101784726; Before the Texas Commission on Environmental Quality

Dear Ms. Castanuela:

Enclosed please find League City Paving Company, Inc.'s Exceptions to the  
Administrative Law Judge's Proposal for Decision for filing. If a hearing is required, please let  
me know of the date and time.

Thank you for your assistance in this matter.

Sincerely,

  
John S. Powell

JSP/gp  
Enclosure  
E-filed

cc: The Honorable Administrative Law Judge Richard Wilfong  
State Office of Administrative Hearings  
300 W. 15<sup>th</sup> Street, Suite 504  
Austin, Texas 78701-1649  
Cert. Mail No. 7008 0500 0001 3193 1477

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Ms. LaDonna Castanuela

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Ms. Tammy L. Mitchell  
Attorney, Litigation Division  
TCEQ  
P. O. Box 13087, MC-175  
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Via facsimile (512) 239-3434

League.City.Paving.ltr.exceptions.courts.rulings

TCEQ DOCKET NO. 2011-1756-MLM-E  
SOAH DOCKET NO. 582-12-5907

EXECUTIVE DIRECTOR OF THE TEXAS	§	BEFORE THE STATE OFFICE
COMMISSION ON ENVIRONMENTAL	§	
QUALITY,	§	
	§	
PETITIONER	§	
	§	OF
VS.	§	
	§	
LEAGUE CITY PAVING COMPANY, INC.,	§	
	§	
RESPONDENT	§	ADMINISTRATIVE HEARINGS

**LEAGUE CITY PAVING COMPANY, INC.'S**  
**EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S**  
**PROPOSAL FOR DECISION**

League City Paving, Inc. makes and files the following exceptions brief to the Administrative Law Judge's findings and proposal for decision. The Court's findings, and conclusions are not substantiated by the trial evidence, thus the Court's proposal is an unfair and unjust resolution of the TCEQ Executive Director's action against the Respondent.

**Review of Background Facts**

League City Paving Company, Inc. (hereinafter "LCPC, Inc.") owns and operates a small asphalt and paving business in League City, Galveston County, Texas. In conjunction with, and as a necessary part of its business, LCPC, Inc. uses various construction materials and maintains various machinery and equipment like any other asphalt and paving business, including inoperable machinery and equipment from which it obtains spare parts, and mounds of inorganic material which is used in road building.

In 2007, LCPC, Inc. agreed to perform certain remedial actions, including cleanup of the property and removal of some of the machinery and equipment. For such violations, LCPC, Inc. was assessed a penalty of \$7,350.00, which it has now paid. In 2011, when the investigation

which gave rise to the present TCEQ Action was conducted, some but not all of the remedial cleanup had not been done. For LCPC's delay, the TCEQ seeks a penalty of \$8,750.00, and the TCEQ additionally seeks what the TCEQ is calling a "Base Penalty" of \$35,000.00. ...It is such Base Penalty of \$35,000.00 LCPC, Inc. challenged before the Administrative Judge, and challenges now, as being not supported by the trial evidence which was recorded on an audiotape.

In that the Administrative Law Judge proposes such Base Penalty of \$35,000.00 in addition to that assessed for LCPC's delay in cleaning up the site, \$8,750.00, the Court's proposal is unreasonable, unfair, and therefore unjust.

### **Trial Evidence**

The Administrative Law Judge made an audio recording of all of the oral testimony in the trial. LCPC, Inc. now asks that copies of the recording be made available to the undersigned as counsel for LCPC, Inc. and the TCEQ prior to any final resolution of the case since it is LCPC, Inc.'s position that such audio recording will show that the TCEQ failed to meet its burden of proof: TCEQ witnesses clearly agreed that conditions on the property, except for a small spill they contended to be "an unknown substance", "were the same conditions as existed on the property in 2007." No trial witness testified upon her personal knowledge about anything existing upon the property in 2011. Indeed no trial witness even visited the property in 2011, and the only new *allegation* concerned a small "spill" of some four cubic yards. No one rebutted League City Paving Company, Inc.'s photographic evidence showing that problems which existed in 2007 have been cleaned up, no one challenged testimony of League City Paving Company, Inc. which established that the "spilled" material is emulsion used in all asphalt roads, not waste, and no one rebutted LCPC, Inc.'s evidence that the mound of material —regardless of

whether its volume was “3,490 cubic yards”, or “129 cubic yards” — is not “waste” but is material commonly used in asphalt paving construction.

LCPC, Inc. challenges the Administrative Law Judge’s “explanation” of how the TCEQ —supposedly using established guidelines— first calculated and sought a penalty of \$77,654.00 in this case but then reduced the amount to \$43,750.00. ... “Correction of the Penalty calculation” (from \$77,654.00 to \$43,750.00) was supposedly made because the investigator first calculated the volume of cubic yards in the mound of material to be “3,490” then corrected that volume to “129”. About 25 times less in volume than the volume originally calculated. — No one even attempted to explain how he could have made such a large error. However, using that reasoning... if any penalty is assessed for the mound (which LCPC, Inc. obviously objects to) why shouldn’t the penalty be about 1/25th of the \$77,654.00 or about \$3,200.00?

LCPC, Inc. also challenges the Base Penalty of \$35,000.00 on the basis that it has already paid \$7,350.00 for violations which the TCEQ’s witnesses admit are the “same” violations/conditions which existed on the property in 2007. ...Why should it be penalized in the amount of \$8,750.00 for delay in cleanup of the 2007 conditions, and be required to pay again ...twice financially jeopardized... for the same conditions?

LCPC, Inc. also contends that there is no reasonable basis for a Base Penalty of \$35,000.00, when for the same conditions, LCPC, Inc. was assessed a penalty of \$7,350.00. LCPC, Inc. is not contesting the \$8,750.00 penalty for its delay in cleanup but there is no rational basis for a Base Penalty and no rational basis for the Base Penalty to increase (for the same conditions) from \$7,350.00 to \$35,000.00.

No trial testimony — expert or otherwise— established any new “discharge of any industrial solid waste, discharge of any municipal solid waste, contamination of groundwater or

threatened danger to the environment,” with the only exception of perhaps one picture showing a puddle of water. Therefore, no testimony or exhibit other than that photo proves any new allegation of the TCEQ.

LCPC, Inc. challenges the Court’s finding that vehicles still on the property in 2011 were “waste” and were not being maintained for spare parts based upon the fact that grass around some of the vehicles had not been cut recently. Grass not being cut around the vehicles does not cancel the testimony of Mr. Philips that the vehicles were still being maintained for spare parts and had not been abandoned. There was no rebuttal TCEQ evidence. ...Furthermore, one only has to consider wrecked vehicles in automobile junk yards all over Texas to understand that such vehicles are not waste regardless of how frequent the grass is cut around them, how often/seldom used parts are salvaged from them, and how many thousands are simply kept as an investment then sold as scrap metal.

The only allegation of substance which was proven by TCEQ witnesses was that some of the conditions which existed in 2007 were not cleaned up in 2011. As previously stated, that allegation is not contested by League City Paving Company, Inc., however, any amount above the amount of the penalty the TCEQ seeks for LCPC, Inc.’s non-compliance (\$8,750.00) was not proven and therefore would be unjust. That amount is set out on the Penalty Calculation Worksheet [PCW] attached to the TCEQ’s pleadings as well as League City’s Paving Company, Inc.’s Post-Trial Brief. That’s the amount the TCEQ wants for LCPC, Inc.’s failure to perform remedial action timely.

LCPC, Inc. also challenges the Court’s finding that the testimony of its representatives is insufficient to show the poor financial condition of their company. It is undisputed that they provided tax returns, other documents containing financial information, and testified live that

they were barely scraping by —and “did not have the money even to pay themselves...” The only testimony provided by TCEQ witnesses was to the effect that the TCEQ did not have sufficient information to meet “the TCEQ’s criteria” for making an evaluation. Nothing rebutted the testimony of LCPC, Inc.’s owners, and no expert testimony was offered by the TCEQ. Therefore, the Court’s refusal to take the company’s poor financial condition into consideration is arbitrary and unreasonable.

### **Conclusion**

In that the only proven contention of the TCEQ is that LCPC, Inc. failed to carry through with its agreement to timely clean up the site, no evidence supports any new “Base Penalty”. The TCEQ simply failed to put on any competent proof of any new violation warranting a Base Penalty. LCPC, Inc. has already been fined and paid \$7,350.00 for previous violations, thus this small Company should not be fined again for the same 2007 violations; only for failure to comply timely with its agreement. Furthermore, nothing justifies a fine of \$35,000.00 for violations previously assessed at \$7,230.00. If, for the same violations, \$7,350.00 was once fair and reasonable as a “Base Penalty”, a larger penalty is patently unreasonable.

WHEREFORE, for reasons stated above, no assessment against LCPC, Inc. above \$8,750.00 is reasonable.

Respectfully submitted,

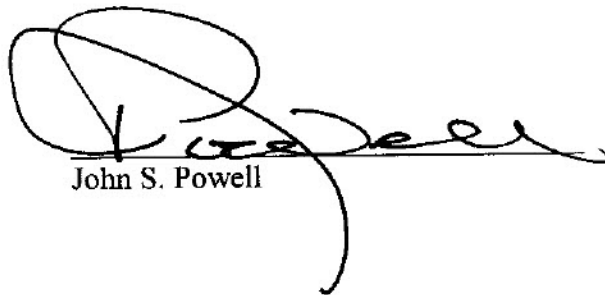
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By: 

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### Certificate of Service

I, the undersigned, do hereby certify that on this 25<sup>th</sup> day of April, 2013, I served a copy of the foregoing exceptions brief upon the TCEQ's attorney of record, Ms. Tammy Mitchell, by electronic transmission to (512) 239-3434; The Chief Clerk of the Texas Commission on Environmental Quality by e-filing, and the Honorable Richard R. Wilfong, Administrative Law Judge at 300 W. 15<sup>th</sup> Street, Suite 502, Austin, Texas 78701 by certified United States mail, return receipt requested.

A handwritten signature in black ink, appearing to read "John S. Powell", with a large, stylized loop at the beginning and a long, sweeping underline.

John S. Powell